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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

12 DAVID SAPPER,

13 Defendant
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Case No.:2:12-cr-00435-JAD-CWH

**Order Denying Motion to Dismiss
Indictment (#13) and Adopting
Report and Recommendation (#22)**

15
16 **I.**

17 **Introduction**

18 Pending before the Court is Defendant's Motion to Dismiss Indictment based upon
19 a claim of Outrageous Government Conduct. Doc. 13. On April 15, 2013, United States
20 Magistrate Judge C. W. Hoffman, Jr. filed a Report and Recommendation, which
21 recommends the denial of the Motion to Dismiss. Doc. 22. Defendant David Sapper
22 timely objected, and the Government responded. Docs. 23, 24. After a comprehensive,
23 de novo review pursuant to 28 U.S.C. § 626(b)(1) and Local Rule 3-2 and full
24 consideration of the Defendant's objection and the Government's response, this Court
25 adopts the Magistrate Judge's recommendation and denies the motion to dismiss based on
26 the reasons set forth in the recommendation and the additional reasons below.
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1 concluding that, based on the totality of circumstances, the government's actions were
2 permissible because law enforcement should be required to have some indicia of illegality
3 before targeting a suspect for investigation. *Id.* at 4. Third, Defendant argues that the
4 Magistrate erred in declining to address whether the ancillary felon-in-possession charge
5 should be dismissed because he improperly concluded that Defendant failed to challenge
6 the validity of the search warrant. *Id.*; *see also* Doc. 22 at 6 n.2. The court considers and
7 overrules each of Defendant's objections in turn.

8 III.

9 Discussion

10 A. ***Bonanno* Is Not a Mandatory Checklist for Legitimate Government Activity.**

11 The crux of Defendant's objection is the significance of the passage in the Ninth
12 Circuit's decision in *United States v. Bonanno* that states:

13 Unacceptable governmental conduct occurs when the government agents
14 act brutally by using physical or psychological coercion against the
15 defendant, or the agents engineer and direct the criminal enterprise from
16 start to finish. The government's conduct is permissible when: (1) the
17 defendant was already involved in a continuing series of similar crimes, or
18 the charged criminal enterprise was already in progress at the time the
government agent became involved; (2) the agent's participation was not
necessary to enable the defendant to continue the criminal activity; (3) the
agent used artifice and stratagem to ferret out criminal activity; (4) the
agent infiltrated a criminal organization; and (5) the agent approached
persons already contemplating or engaged in criminal activity.

19 852 F.2d 434, 437-38 (1988). Defendant contends that "[t]hese factors are listed in the
20 conjunctive; each factor must be met, or the government's conduct must be considered
21 unacceptable." Doc. 23 at 3. Thus, Defendant argues, "[t]he Magistrate Judge
22 misapplied Ninth Circuit case law when it held that the elements of legitimate
23 government activity are factors rather than elements." *Id.*

24 The Court disagrees with Defendant's interpretation of this passage in *Bonanno* as
25 a five-part test for "legitimate government activity," each part of which must be "met" for
26 the government's conduct not to be considered outrageous and the indictment to stand.

1 The Court agrees with the Magistrate Judge that the *Bonanno* factors “only help guide”
2 the court’s “totality of the circumstances analysis” for the reasons set forth in the Findings
3 and Recommendation. See Doc. 22 at 6-7. And the Court additionally concludes that the
4 origin of *Bonanno*’s five-part list, its structure and content, and its application by the
5 Ninth Circuit and other district courts within the circuit further demonstrate that the five
6 factors in *Bonanno* are, at most, a list of law-enforcement methods that the courts have
7 found independently acceptable and that serve as non-exclusive guidelines for analyzing
8 whether the police conduct “is so grossly shocking and so outrageous as to violate the
9 universal sense of justice.” *United States v. Mayer*, 503 F.3d 740, 754 (9th Cir. 2007)
10 (internal quotation and citation omitted).

11 ***1. The Source of Bonanno’s Five-factor List Demonstrates That it Is Not***
12 ***Intended as a Reverse Checklist for Validating Government Conduct.***

13 The Ninth Circuit’s decision in *United States v. Bogart*, 783 F.2d 1428, 1438
14 1986)—the source of the *Bonanno* list—demonstrates that this enumerated list is merely a
15 collection of various law-enforcement methods that courts have validated as not
16 outrageous. In *Bogart*, the Ninth Circuit articulated the detailed history of the outrageous
17 conduct defense along with “[a] summary of the present case law in this difficult area” to
18 “assist the district court on remand in resolving the merits of Bogart’s” claim. *Bogart*,
19 783 F.2d at 1431-38. The *Bogart* court reiterated that “governmental conduct would be
20 constitutionally impermissible only where it went beyond ‘that fundamental fairness,
21 shocking to the universal sense of justice,’” “the precise parameters” of which it admitted
22 are “probably indefinable.” *Id.* at 1434-35 (quoting *United States v. Russell*, 411 U.S.
23 423, 432 (1973)). It noted, but rejected, the approach of some courts that had limited the
24 defense to the “highly discrete group of extreme cases of police brutality,” adopting
25 instead a “broader definition of unconstitutional outrageous conduct” that also includes
26 “those hopefully few cases where the crime is fabricated *entirely* by the police to secure
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1 the defendant's conviction rather than to protect the public from the defendant's
2 continuing criminal behavior." *Id.* at 1436 & 1438.

3 The *Bogart* Court then stressed that "[d]rawing a bright line with any degree of
4 assurance is fraught with problems" and "probably cannot be usefully defined in the
5 abstract. Ultimately, every case must be resolved on its own particular facts." *Id.* at
6 1438. However, the Court offered "some general observations" and "general
7 principle[s]" from the cases refusing to apply the outrageous conduct defense, and noted
8 that various government methods that have been found constitutionally acceptable include
9 infiltrating a criminal enterprise already in progress, using "artifice and stratagem to ferret
10 out criminal activity," and "approach[ing] people already engaged in or contemplating
11 criminal activity." *Id.* at 1437-38 (quoting *Sorrells v. United States*, 287 U.S. 435, 441
12 (1932)).

13 It is from these "general observations" and "general principles" that the *Bonanno*
14 five-item list is derived. See *Bonanno*, 852 F.2d at 437-38 (citing *Bogart*, 783 F.2d at
15 1437-38). Nothing in *Bonanno* suggests that all five of these general observations or
16 principles must be present for the government's conduct to be deemed permissible. Even
17 the *Bonanno* court did not apply this list as a test; it rejected *Bonanno*'s outrageous
18 government conduct defense after finding just one of these principles – "[t]he defendants
19 . . . were already involved in the purchase order scheme when [the informant] approached
20 them." *Id.* at 438. And the *Bonanno* court also did not refer to these list items as
21 "factors," which contrasts with its description of the "five factors to consider when
22 determining whether a defendant was entrapped," just five paragraphs later. *Id.* at 438.
23 When the *Bonanno* court itself did not treat these five considerations as elements of a
24 conjunctive test for legitimate government conduct, this Court is not persuaded to do so.
25 Post-*Williams* decisions from the Ninth Circuit further evince that the touchstone for
26 outrageousness remains whether the conduct is "so grossly shocking and so outrageous as
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1 to violate the universal sense of justice,” not a rigid five-part test. *United States v.*
2 *Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1768 and 132 S. Ct.
3 1773 (2012) (quoting *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir.1991)).

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5 **2. Defendant’s Interpretation of Bonanno Impermissibly Shifts the High Burden of Proof to the Government.**

6 To read *Bonanno* as providing a five-part test that the government must satisfy
7 would also improperly shift the burden to the government to demonstrate “legitimate
8 government activity.” Doc. 23 at 3. **Defendants** bear the burden of proving that the
9 government’s conduct was “‘so excessive, flagrant, scandalous, intolerable, and offensive
10 as to violate due process.’” *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996)
11 (quoting *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir.1993)); *see also*
12 *United States v. McDavid*, 396 F. App’x 365, 371 (9th Cir. 2010) (quoting *Edmonds*, 103
13 F.3d at 825 & 826, and noting that the burden is on the defendant to meet the “extremely
14 high standard” of proving “that the government’s conduct was ‘so excessive, flagrant,
15 scandalous, intolerable, and offensive as to violate due process.’”). It is unlikely that the
16 Ninth Circuit panel intended to shift that burden with its summary statement in *Williams*
17 that *Bonanno* “set forth five factors that, when satisfied, indicate that the governmental
18 conduct was acceptable.” *Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008).

19 **3. Other District Courts in this Circuit Agree that Bonanno Did Not**
20 **Supplant the Totality-of-the-Circumstances Analysis for Outrageous**
Governmental Conduct.

21 Finally, the Court is also persuaded by the reasoning of other district courts within
22 this circuit that have considered and rejected the *Bonanno* argument that Defendant
23 advances here. As the Magistrate Judge noted, in *United States v. Simpson*, 2010 WL
24 16611483 (D. Ariz. Apr. 20, 2010), the Court concluded that “outrageous government
25 conduct is to be analyzed by considering the totality of the circumstances in each case,”
26 and the *Bonanno* “factors are guidelines that provide a means to analyze the government’s
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1 behavior.” *Simpson* at *8. They “appear to function more like a balancing test than a *sine*
2 *qua non* checklist of absolute requirements for government behavior to be acceptable,” as
3 “*Williams* does not say if, *and only if*, the five *Bonanno* factors are met, the government
4 conduct is acceptable.” *Id.*

5 Other courts have adopted the *Simpson* court’s reasoning. In *United States v.*
6 *Wilson*, 2012 WL 460342 (S.D. Cal. Feb. 10, 2012), the court denied a motion to dismiss
7 in which the Defendant argued that the government’s failure to satisfy the *Bonanno*
8 factors rendered the government’s sting operation outrageous. The Court relied on
9 *Simpson* and the instruction in *Bogart* that “every case must be resolved on its own
10 particular facts,” 783 F.2d at 1438, and held that this “ordinary sting operation” in which
11 the government supplied defendants counterfeit credit cards and initially raised the idea of
12 a counterfeit credit card scheme “was not so egregious as to shock ‘the universal sense of
13 justice.’” *Wilson*, 2012 WL 460342 at *3-4 (quoting *United States v. Citro*, 842 F.2d
14 1149, 1153 (9th Cir. 1988)). And, as the Magistrate Judge noted, the district court
15 similarly followed *Simpson* when denying a motion to dismiss in *United States v.*
16 *Velasquez-Lopez*. “The *Bonanno* court lists five examples of situations in which the
17 ‘government’s conduct is permissible.’ The Defendants seek to argue the reverse of these
18 examples, contending that, if none of these five situations occurred, then, as a matter of
19 law, the government conduct has been outrageous. This Court does not so read *Bonanno*
20 as such a ‘reverse-checklist.’” 2010 WL 1996605, *2 (D. Ariz., May 19, 2010) (internal
21 citations omitted). *See also United States v. Cota-Ruiz*, 2012 WL 5439057, *4 (D. Ariz.
22 Oct. 12, 2012) (“Defendant . . . overstates the significance of the five factor test discussed
23 in” *Williams*; “it is not mandatory that the government satisfy all five of these factors for
24 the court to find the government’s conduct was not outrageous.”)

25 In sum, the Court finds insufficient support for Defendant’s objection that the
26 Ninth Circuit requires the *Bonanno* five factors to be met “or the government’s conduct
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1 must be considered unacceptable.” Doc. 23 at 3. If there is a “test” for outrageous
2 government conduct, it is whether the totality of the circumstances, juxtaposed against the
3 rich history of cases in which outrageous government conduct claims have been
4 considered, reveals that “the government’s conduct violates fundamental fairness and is
5 ‘shocking to the universal sense of justice mandated by the Due Process Clause of the
6 Fifth Amendment.’” *Gurolla*, 333 F.3d at 950 (quoting *Russell*, 411 U.S. at 431-32).

7 **B. Defendant Has Not Satisfied His High Burden of Demonstrating that the**
8 **Government’s Conduct Was So Grossly Shocking and so Outrageous as to**
9 **Violate the Universal Sense of Justice.**

10 The second half of Defendant’s objection to the Magistrate Judge’s Findings and
11 Recommendation is that the judge erred in determining “that, based on the totality of the
12 circumstances, the government’s actions were permissible.” Doc. 23 at 3. Defendant
13 highlights that his personal-ad posting had no outward indication that the defendant was
14 seeking to contact a minor and contends that this lack of evidence that he was seeking
15 minors for sexual activities made it outrageous to target him in this sting operation. *Id.* at
16 4. And he argues that police should be required to have “some indicia of illegality” being
17 undertaken by the defendant before police may make him a target of investigation. *Id.*

18 **1. The Law Does Not Require an Indicia of Illegality before Targeting a**
19 **Suspect.**

20 The notion that the government needs an articulated reason to target a particular
21 participant in an investigation has been rejected by the Ninth Circuit. In *United States v.*
22 *Luttrell*, 889 F.2d 806, 812 (9th Cir. 1989) (“*Luttrell I*”), *rev’d en banc*, 923 F.2d 764 (9th
23 Cir. 1991) (“*Luttrell II*”), a Ninth Circuit panel considered, *inter alia*, whether
24 investigators engaged in outrageous governmental conduct when they launched a sting
25 operation without having any basis for believing that the targets of the investigation were
26 engaged in any wrong doing. The defendant had lost a significant sum of money when
27 circumstances beyond his control rendered useless credit card drafts he had received on
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1 account of legitimate services he had provided. *Id.* at 808. The government subsequently
2 hired an informant, who himself was awaiting sentencing for a credit card violation and
3 was defendant's former acquaintance. *Id.* After setting up a fictitious credit card
4 factoring business, the government had the informant contact the defendant to negotiate a
5 deal whereby the informant would fraudulently factor the defendant's credit card drafts
6 through a series of transactions. *Id.* After the defendant provided the informant with the
7 credit card drafts, the government charged the defendant with, among other things,
8 attempt to traffic in counterfeit drafts. *Id.* at 809.

9 The court did not find outrageous conduct. However, it did state that law
10 enforcement "violate[s] constitutional norms when, without reasoned grounds, they
11 approach apparently innocent individuals and provide them with a specific opportunity to
12 engage in criminal conduct." *Id.* The court reasoned, "[w]e see substantial mischief in
13 *any pattern* of law enforcement that arbitrarily targets for intrusion the lives of
14 individuals who, to all reasonable appearances, are minding their own business." *Id.*
15 (emphasis added).

16 But on en banc rehearing, the court partially vacated the three-member-panel
17 decision, reasoning, "we follow our sister circuits in explicitly rejecting a 'reasoned
18 grounds' requirement for investigation of an individual under the due process clause."
19 *Luttrell II*, 923 F.2d at 764 (citing *United States v. Jenrette*, 744 F.2d 817, 824 (D.C. Cir.
20 1984) (no constitutional violation where FBI targeted defendant without "reasonable
21 suspicion" of wrongdoing); *United States v. Gamble*, 737 F.2d 853, 860 (10th Cir.1984)
22 ("government need not have reasonable suspicion of wrongdoing in order to conduct an
23 undercover investigation"); *United States v. Jannotti*, 673 F.2d 578, 608–09 (3d Cir.
24 1982) (*en banc*) (rejecting "reasonable basis" test); *United States v. Myers*, 635 F.2d 932,
25 941 (2d Cir. 1980) (rejecting "reasonable suspicion" requirement)).

26 Two years later in *United States v. Garza-Juarez*, the Ninth Circuit applied *Luttrell*
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1 *II* in rejecting the defendant’s claim that the government acted outrageously by “targeting
2 him for an investigation without any reason to suspect he was engaged in illegal conduct.”
3 992 F.2d 896, 904 (1993). “To the extent that this argument relies on the government’s
4 lack of a reasoned ground for investigating [defendant], it must fail under the teachings of
5 our en banc opinion in *Luttrell*.” *Id.* “Therefore, any inability to state reasons for
6 investigating [defendant] does not represent a constitutional violation.” *Id.* Thus, the
7 Ninth Circuit very clearly recognizes that the government need not have any reasoned
8 grounds or indicia of illegality for initiating an investigation or targeting a specific person
9 with its undercover operation.

10 Also persuasive is the Third Circuit Court of Appeals’ decision in *United States v.*
11 *Driscoll*, 852 F.2d 84 (1988), affirming the district court’s denial of a motion to dismiss a
12 charge of receiving child pornography through the mails. Driscoll complained “that he
13 was targeted as a suspect . . . when the agents did not have information establishing that
14 he had previously received child pornography through the mails. He seem[ed] to be
15 arguing that there was no reasonable basis for the Postal Service agents to have targeted
16 him.” *Driscoll*, 852 F.2d at 86-87. The Court did not find this lack of grounds for
17 suspicion evidence of outrageous conduct, reasoning, “where the conduct of the
18 investigation itself does not offend due process, the mere fact that the investigation may
19 have been commenced without probable cause does not bar the conviction of those who
20 rise to its bait.” *Id.* at 87 (quoting *Jannotti*, 673 F.2d at 609).

21 **2. *The Totality of the Circumstances Lack the Conscience-shocking Facts***
22 ***Necessary to Establish an Outrageous Government Conduct Claim.***

23 Defendant Sapper may not have initiated the contact with the undercover agent he
24 believed to be a 14-year-old girl, but he quickly rose to the bait and was thereafter the
25 party responsible for all aspects of the crime. It was Defendant who asked “How young?”
26 and was undeterred by the response (and later reminders) that she was 14 years old, Doc.

1 13 at 35, 37; asked for photos, *id.* at 35; turned the conversation sexual in nature, *id.* at
2 36; indicated he would “love to set something up” with the responder, *id.*; significantly
3 escalated the sexual nature of the conversation by proposing various, specific sexual acts
4 he wanted them to perform on each other, *id.* at 37-42; encouraged her to sneak out of the
5 house and meet him so they could engage in such acts, *id.* at 39-42; suggested what she
6 should wear for the rendez-vous, *id.* at 42; and drove the pre-described car to pick her up
7 at the agreed-upon location and time. *Id.*

8 In sum, the government provided Sapper only with the opportunity to commit the
9 crime, and this is not a scenario in which the government “engineer[ed] and direct[ed] the
10 criminal enterprise from start to finish,” because there would have been no criminal
11 enterprise without Defendant’s acts. *Bogart*, 783 F.2d at 1436 (quoting *United States v.*
12 *Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983)); *see also United States v. Cruz*, 2013 WL
13 3833033 (E.D. Cal. Jul. 23, 2013) (denying motion to dismiss indictment for enticement
14 of a minor where defendant’s initial Craigslist posting specifically requested “over 18”
15 contact, defendant continued to pursue sexual relationship with undercover responder he
16 believed to be a 13-year-old girl, and defendant arranged to meet her at a fast-food
17 restaurant, where he was ultimately arrested); *cf. State v. Cunningham*, 808 N.E.2d 488,
18 492 (Ohio Ct. App. 2004) (finding that undercover officer’s act of posing as a 14-year-old
19 girl in an internet chat room was not outrageous, reasoning that the officer “merely gave
20 the Defendant the opportunity to solicit sex from a person who the Defendant believed
21 was a fourteen-year-old minor on the Internet. The situation is analogous to the
22 traditional solicitation case where a ‘john’ solicits sex from an undercover officer posing
23 as a prostitute on a street corner. . . . Use of decoy prostitutes as a means to snare ‘johns’
24 has never been considered so egregious by any court to support this due process
25 defense.”). This Court agrees with the Magistrate Judge that the government conduct
26 here simply does not approach the level of conscious-shocking behavior “so outrageous
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1 that due process principles would absolutely bar the government from invoking the
2 judicial processes to obtain a conviction.” *Bogart*, 783 F.2d at 1432 (quoting *Russell*, 411
3 U.S. at 431-32); Doc. 22 at 9.

4 **C. The Evidence Giving Rise to the Ancillary Charge of Possession of a Firearm**
5 **by a Convicted Felon Is Not Subject to the Exclusionary Rule.**

6 Under the exclusionary rule, evidence obtained in violation of the Fifth
7 Amendment to the United States Constitution may not be introduced at trial to prove a
8 defendant’s guilt. *See Bram v. United States*, 168 U.S. 532, 548 (1897) (evidence
9 obtained through Fifth Amendment violations is excluded in federal court). As the Court
10 has concluded that the law enforcement activity at issue in this case did not constitute
11 outrageous governmental conduct within the meaning of the due process clause under the
12 Fifth Amendment, the exclusionary rule is not triggered. Therefore, the Court overrules
13 Defendant’s objections to the extent they relate to fruit of the poisonous tree under the
14 exclusionary rule.¹

15 **IV.**

16 **Conclusion**

17 Based on the foregoing and for good cause appearing therefore, **IT IS ORDERED**
18 that Magistrate Hoffman’s Findings and Recommendation (Doc. 22) are hereby
19 ADOPTED in their entirety;

20 **IT IS FURTHER ORDERED** that Defendant David Sapper’s Objections to
21 Magistrate’s Findings and Recommendation, (Doc. 23) are **OVERRULED**;

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26 ¹This finding is without prejudice to Defendant bringing a challenge to the validity of the
27 warrant on any other grounds not flowing from his outrageous governmental conduct claim.

IT IS FURTHER ORDERED that the Motion to Dismiss Indictment (Doc. 13) is **DENIED**.

Dated this 10th day of September, 2013.

Jennifer A. Dorsey
United States District Court Judge